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No. 88-1668

In The

Supreme Court of the United States

October Term, 1989

ATLANTIC RICHFIELD COMPANY,

Petitioner,

v.

USA PETROLEUM COMPANY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF PETITIONER ATLANTIC RICHFIELD COMPANY

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QUESTION PRESENTED

Whether a competitor's profits and sales lost as a result of nonpredatory prices imposed by a manufacturer on its retailers through vertical maximum price fixing amount to antitrust injury necessary for the competitor to bring a private antitrust action.

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[1] The statement of Petitioner's Non-Wholly Owned Subsidiaries and Affiliates appears as Appendix D to the Petition for Certiorari. There have been no changes in the interim. This Brief uses "JA" to refer to pages of the Joint Appendix and "Dckt. NR" to refer to Docket Numbers on the list of Relevant Docket Entries (JA 1-9) for items not included in the Joint Appendix.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 859 F.2d 687 and appears as Appendix A to the Petition for Certiorari ("Pet. App. A"). The District Court's unreported ruling granting summary judgment dismissing plaintiff's Sherman Act § 1 claim appears as Appendix B to the Petition for Certiorari ("Pet. App. B").

JURISDICTION

The Court of Appeals entered its judgment in this case on October 7, 1988. The Court of Appeals denied a timely petition for rehearing and suggestion for rehearing *en banc* on January 10, 1989. (Pet. App. C.) A timely petition for writ of certiorari was filed on April 7, 1989. On June 5, 1989 this Court granted the petition. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides in relevant part:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in relevant part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal . . . ."

STATEMENT OF THE CASE

Atlantic Richfield Company ("ARCO") is an integrated oil company that, among other things, refines and markets gasoline throughout the western United States. ARCO markets gasoline to consumers directly through its own gasoline stations and indirectly through independent ARCO-branded distributors and dealers.

USA Petroleum Company ("USA") purchases gasoline from refiners for sale at its USA-brand stations. Some of these USA-brand stations compete with ARCO-brand stations in the market for sales of gasoline to consumers.

ARCO's Low-Price Marketing Program

In April 1982, ARCO embarked upon a highly successful marketing program. ARCO sought to appeal to consumers of gasoline, who had become more price conscious after the dramatic price increases of the 1970's, by becoming a low-price marketer. ARCO discontinued its credit card and otherwise lowered its costs of refining and selling gasoline. Those cost-cutting measures enabled ARCO to lower the wholesale prices charged to independently owned ARCO-branded distributors and dealers as well as to its company-operated stations. ARCO encouraged its customers to pass those decreases along to consumers in the form of lower retail prices.

As a result of its marketing program, the ARCO-brand share of the retail gasoline market in California and Washington increased from the 10% to 12% level in 1981 to approximately 14% to 16% in 1983. (Declaration of Edward G. Reilly, Dckt. NR 80, p. 193.) As the District Court found, the ARCO-brand share of that market never exceeded 17% during any relevant period. (Pet. App. B, ¶ 3.) As the District Court also found, this market share is clearly insufficient for ARCO to exercise any market power over retail gasoline prices. (*Id.*, ¶¶ 3, 4.)

USA's Lawsuit

In May 1983, USA commenced this lawsuit challenging ARCO's marketing program. USA alleged that the lower prices at competing ARCO-branded stations caused USA stations either to reduce prices or to lose sales.[2] It sought both injunctive relief and treble damages measured by the sales and profits allegedly lost at USA stations as a result of competition from the low retail prices at the competing ARCO-branded stations. USA sued only ARCO, and not any ARCO-branded distributors or dealers.

[2] In interrogatory responses, USA identified 66 separate USA stations in the states of California, Washington and Nevada that it contended were most directly and severely injured by the low ARCO prices. It also identified for each of those stations the ARCO station or stations that caused the injury. Of the 102 ARCO stations identified, nine were owned and operated by ARCO throughout the relevant time period. The other 93 were operated by independent ARCO distributors or dealers. (JA 55-64.)

USA's complaint asserted a host of federal and state law claims. Its essence, however, was a claim that ARCO had attempted to monopolize the retail gasoline market by engaging in predatory pricing, in violation of Sherman Act § 2. The complaint also alleged that ARCO had engaged in vertical maximum price fixing with its distributors and dealers in violation of Sherman Act § 1.

The District Court dismissed the original Sherman Act § 2 claim because the complaint alleged facts showing that ARCO could not successfully monopolize the market. *USA Petroleum Co. v. Atlantic Richfield Co.*, 577 F. Supp. 1296, 1304 (C.D. Cal. 1983). USA amended its complaint to allege that ARCO was attempting to monopolize the "discount segment of the gasoline market," which it asserted constituted a separate and distinct market for antitrust purposes. (*See* JA 10-35.) The District Court, while highly skeptical that the claim could succeed when put to a factual test, felt compelled not to dismiss the amended Sherman Act § 2 claim at the pleading stage. (Dckt. NR 54.) Accordingly, the attempted monopolization case proceeded, putting ARCO to the burden of exhaustive document discovery.[3]

ARCO's Summary Judgment

At the conclusion of document discovery, ARCO moved for summary judgment dismissing the Sherman

[3] ARCO devoted approximately 34,000 hours of paralegal, searcher and clerical hours to review millions of pages of documents and produced more than 130,000 pages of documents to USA. (*See* Joint Status Report, Dckt. NR 93, ¶ B.1.)

Act §§ 1 and 2 claims. The motion was based upon an extensive factual record showing that ARCO and the other sellers of ARCO-brand gasoline, individually or collectively, posed no real threat of acquiring monopoly power in any relevant market. The motion demonstrated that there was only a single retail gasoline market, which contained too many competitors, and of which ARCO gasoline had far too small a share, for ARCO (and its dealers) ever to obtain the power to charge supracompetitive prices.[4]

Confronted by ARCO's motion, USA promptly stipulated to dismiss with prejudice its Sherman Act § 2 claim. (JA 76.) USA admitted that ARCO posed no threat of acquiring monopoly power in the retail gasoline market.[5]

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[4] *See* Dckt. NR 79, 80. The legal theory for dismissal of the Sherman Act § 2 claim was that this lack of market power, actual or threatened, precluded USA from establishing one of the substantive elements of such a claim – dangerous probability of monopolization. The legal theory for dismissal of the Sherman Act § 1 claim was that the same lack of current or threatened market power precluded USA, even assuming arguendo that it could prove price fixing, from proving that the challenged ARCO-brand prices were predatory. Accordingly, USA could not satisfy the antitrust-injury requirement imposed by Clayton Act § 4 as a condition for a private action based upon the Sherman Act.

[5] *See, e.g.*, 10/14/86 Transcript of Hearing on ARCO's Summary Judgment Motion, at p. 19, lines 7-10 (USA's counsel, Mr. Blecher, stated "I believe there is no dangerous probability of monopolization and therefore the idea that this price is predatory . . . even by the most liberal standard, is probably going to fail"); USA's Opening Brief in Ninth Circuit, at p. 6 ("Plaintiff, already having abandoned its Section 2 Sherman Act claims, offered no proof on predatory pricing or dangerous probability of monopolization").

USA, however, asserted that its § 1 claim permitted it to recover all the damages sought by its § 2 claim, but without the need to make any showing that its injuries as a competitor reflected or flowed from injury to competition in a relevant market.

The District Court granted ARCO summary judgment dismissing the § 1 claim. (Pet. App. B.) In granting summary judgment, the District Court assumed that USA could prove that ARCO violated Sherman Act § 1 and that USA had lost profits and sales as a result of having had to compete against the lower fixed prices at ARCO-branded stations.[6] The District Court held that USA could not establish that the challenged prices were predatory and therefore could not establish antitrust injury.[7] The

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[6] The District Court thus assumed the existence of the only two facts as to which USA asserted there was a genuine issue on ARCO's motion. (JA 86-87.)

[7] "Even assuming that the plaintiff can establish a vertical conspiracy to maintain low prices, the plaintiff cannot satisfy the antitrust injury requirement of Clayton Act § 4, without showing such prices to be predatory. Under the circumstances here concerned, as indicated in paragraphs 2 to 4 hereof, no such showi[illegible]; [*i.e.*, that the challenged ARCO prices were predatory] can be made." (Pet. App. B, ¶ 5.) Paragraphs 3 and 4 of the District Court's order found the following as existing without substantial controversy:

> "3. The combined share of the relevant market held by Atlantic Richfield and other ARCO-brand gasoline sellers is clearly insufficient to present a dangerous probability of monopolization, particularly in light of the com-

(Continued on following page)

District Court directed the entry of judgment on the Sherman Act § 1 claim pursuant to Fed. R. Civ. P. 54(b) so that USA Petroleum could appeal this determinative issue of law.

The Ninth Circuit Decision

A panel of the Ninth Circuit, dividing two to one, reversed the District Court's summary judgment and remanded the § 1 claim for trial.

The majority opinion stated that the antitrust-injury issue was a "difficult question" and one of "first impression" within the Ninth Circuit. 859 F.2d at 689. It also recognized that the Seventh Circuit previously had decided the very same issue in *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 709 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984) (*"Jack Walters"*). However, the majority refused to follow the Seventh Circuit rule that a plaintiff suffers antitrust injury only when its competi-

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(Continued from previous page)

petition of other major oil companies. The ARCO-brand share of the retail gasoline market in California and Washington, the states in which USA contends it has been injured, has not exceeded 17 percent during the relevant period.

4. Even assuming *arguendo* that there exists a separate 'discount' gasoline market, other major oil companies may enter this market, as USA contends that Atlantic Richfield did in April 1982, and the possibility of such entry effectively prevents Atlantic Richfield and other sellers of ARCO-brand gasoline from exercising monopoly power in that market regardless of their market share."

USA did not challenge these findings on appeal.

tor's prices set by vertical maximum price fixing are predatory. Instead, it in essence held that a competitor establishes antitrust injury simply by showing that its injuries were caused in fact by the lower prices resulting from vertical maximum price fixing because such price fixing is *per se* illegal. 859 F.2d at 697.

The dissent disagreed. It read this Court's controlling case law on "antitrust injury" to require an antitrust plaintiff to establish more than cause-in-fact injury. Specifically, the dissent would require the plaintiff to establish that its "alleged injury results from the *anticompetitive* aspects of" the violation – even where the violation is *per se* illegal. 859 F.2d at 701 (Alarcon, J., dissenting). And, the dissent found that USA could not establish antitrust injury here because of the unchallenged District Court finding that the fixed prices were not predatory. *See* 859 F.2d at 703-705.

ARCO filed a motion for rehearing and suggestion that the rehearing be *en banc* because of the conceded conflict with the Seventh Circuit. The Seventh Circuit then, in a unanimous opinion by the Chief Judge, reaffirmed its antitrust-injury rule limiting competitor suits challenging vertical maximum price fixing to predatory prices. *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409 (7th Cir. 1989) (*"Indiana Grocery"*). That opinion stated that the Ninth Circuit decision, by reducing the antitrust-injury requirement to a mere cause-in-fact test for *per se* violations of the Sherman Act, stood "the antitrust injury inquiry on its head." 864 F.2d at 1419 n.6. Despite the Seventh Circuit decision, the Ninth Circuit panel denied ARCO's motion for a rehearing. (Pet. App. C.)

SUMMARY OF ARGUMENT

This Court's antitrust-injury requirement demands a careful analysis of the relationship between the specific injury claimed by a plaintiff and the reasons why the courts have made the conduct causing that injury unlawful. Such an analysis is necessary, because the purpose of the requirement is to link together the provisions of the antitrust laws providing for private recovery (Clayton Act §§ 4 and 16) with those defining substantive violations (including Sherman Act § 1).

A private plaintiff can seek redress only for a loss "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) ("*Brunswick*"); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 113 (1986) ("*Cargill*"). A plaintiff cannot recover for "losses which are of no concern to the antitrust laws." 429 U.S. at 487. A plaintiff also cannot recover for losses that reflect increased competition because such a recovery would be "inimical to the purposes of" the antitrust laws. 429 U.S. at 488.

The Ninth Circuit's opinion substitutes for the analysis mandated by this Court's opinions a formalistic incantation of labels. The result is a rule permitting a competitor who proves vertical maximum price fixing to recover for losses attributable to the increased competition from the lower fixed prices. This rule divorces, rather than links together, antitrust remedies and antitrust policy. Such losses of a competitor do not reflect the anticompetitive effects that make vertical maximum price fixing

illegal. Moreover, a competitor's losses from nonpredatory prices reflect increased interbrand competition, which is the primary concern of the antitrust laws.

To be sure, the Ninth Circuit opinion asserts that its rule comports with the limitations set out in this Court's antitrust-injury opinions. But the Ninth Circuit opinion misstates both the standard for determining antitrust injury and the elements involved in that determination. The Ninth Circuit states that the test for antitrust injury is "whether the plaintiff's injuries resulted from a disruption of competition in the plaintiff's market caused by the defendant's antitrust violation." 859 F.2d at 693. This statement of the test erroneously focuses on the market generally rather than on the specific plaintiff's injury and does not require a correlation between the plaintiff's injury and the reasons why the defendant's conduct is illegal. Having misstated the test, the Ninth Circuit then relies upon two mistaken presumptions to conclude erroneously that a competitor's injury from nonpredatory vertical maximum price fixing is antitrust injury.

The proper analysis, required by this Court's opinions but eschewed by the Ninth Circuit, demonstrates that there is no relationship between a competitor's losses and the policies and effects that make vertical maximum price fixing *per se* illegal. Those losses therefore do not satisfy the antitrust-injury requirement.

A correct analysis also shows that USA's losses here resulted from increased competition. The primary concern of antitrust law is interbrand competition, because it leads to lower prices and increased output for consumers. *See Business Electronics Corp. v. Sharp Electronics Corp.*, 485

U.S. ___, 108 S. Ct. 1515, 1521 (1988) ("*Sharp*"). The lower ARCO prices challenged here unquestionably increased competition between ARCO and the other brands of gasoline, including USA. Indeed, that is the reason for USA's lawsuit.

Moreover, the lower ARCO prices assumed in this case to result from vertical maximum price fixing cannot injure consumer welfare. The District Court's unchallenged findings that these prices present no danger of creating a market structure that will permit supracompetitive prices in the future establish that they represent an immediate gain which will not later be offset by any corresponding injury to consumers. Such prices cannot inflict antitrust injury.

ARGUMENT

I. THE NINTH CIRCUIT RULE PERMITTING RECOVERY FOR A COMPETITOR'S LOSSES FROM NONPREDATORY VERTICAL MAXIMUM PRICE FIXING FAILS TO GIVE EFFECT TO THIS COURT'S ANTITRUST INJURY REQUIREMENT

A. A Plaintiff Suffers Antitrust Injury Only Where Its Losses Reflect The Anticompetitive Effects That Make The Defendant's Conduct Unlawful

In *Brunswick*, 429 U.S. at 489, this Court held that a plaintiff under Clayton Act § 4 must:

> "prove *antitrust* injury . . . of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation."

The plaintiffs in *Brunswick* had won a jury verdict of $2,358,000 (before trebling), representing profits they would have earned if competing bowling alleys acquired by defendant through acquisitions assumed to violate Clayton Act § 7 had instead been allowed to go out of business, as would have occurred but for the illegal merger. The Court held that the mere showing that plaintiffs' injury had been caused in fact by an antitrust violation did not satisfy Clayton Act § 4. *Id.*

The Court held that the plaintiffs also had to show that their injury reflected the "reason the merger was condemned" under the antitrust laws. 429 U.S. at 487. The merger was assumed for purposes of the appeal to be illegal because it created a deep pocket competitor that could have engaged in predatory conduct. *Id.* The plaintiffs' losses, however, resulted simply from continued competition from these centers that otherwise would have gone out of business, and not from any predatory conduct. The Court refused to allow an antitrust recovery where there was no clear linkage between the plaintiffs' injury and the anticompetitive effects that were assumed to make the merger unlawful.

The Court's opinion offered several different formulations of the reasons for imposing such a limitation on private antitrust recovery. It described the lower courts' award of damages as "divorc[ing] antitrust recovery from the purposes of the antitrust laws without a clear statutory command to do so. . . ." 429 U.S. at 487. It further

described the award of such damages as incorrectly allowing recovery for all dislocations caused by an antitrust violation "regardless of whether those dislocations have anything to do with the reason the [conduct illegal under the antitrust laws] was condemned," and stated that such a result "would make § 4 recovery entirely fortuitous, and would authorize damages for losses which are of no concern to the antitrust laws." *Id.* The Court further noted that the plaintiffs' injury bore "no relationship to" the anticompetitive effects which made the challenged merger illegal, because plaintiffs "would have suffered the identical 'loss' – but no compensable injury" had the proscribed effects not been present. *Id.*

By relating the private remedies for an antitrust violation to the reasons for substantive illegality, the Court announced a limitation akin to the common law rule barring recovery for injuries different from those which a statute was designed to prevent.[8] *See Jack Walters*, 737 F.2d at 708-09 (*Brunswick* represents "the application to antitrust law" of this tort doctrine). The Court's limitation of the losses for which antitrust recovery is available, like the analogous common-law limitations, serves to keep

[8] In one of the early cases in which this doctrine was established, *Gorris v. Scott*, 9 L.R.-Ex. 125 (1874), the court held that a shipper could not recover damages for sheep lost overboard while in the care of the defendant shipowner despite the defendant's violation of an Act of Parliament requiring that animals being shipped be held in pens. The court did so because the Act had been passed to keep the animals from contaminating each other, not to keep them from being swept overboard. While the lack of pens was a "but for" cause of the loss of the sheep, that loss did not reflect the policies underlying the Act and thus was not compensable.

the size of damage awards related to the basis of the defendant's substantive liability. Page, *The Scope of Liability for Antitrust Violations*, 37 Stan. L. Rev. 1445, 1461 (1985).

The *Brunswick* Court also articulated as a reason for its decision that it would be "inimical to the purposes of" the antitrust laws to award damages for the losses claimed in that case. 429 U.S. at 488. The Court noted that "the antitrust laws [were] not merely indifferent to the injury claimed. . . ." *Id.* The plaintiffs claimed profits lost as a result of increased competition. The fact that the increased competition had been enabled by an antitrust violation was not relevant to the antitrust-injury issue because a competitor's lost profits were not the concern of the antitrust laws. Those laws "were enacted for 'the protection of *competition*, not *competitors*.'" *Id.* (*quoting Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

Subsequent opinions of the Court have reaffirmed the antitrust-injury requirement, its common-law roots and its antitrust-policy rationales. In *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 477 & n.13 (1982), the Court, in the context of a Sherman Act § 1 case, reaffirmed the historical and current bases of the limitations on private antitrust recovery. The Court expressed the historical basis by describing the analysis under Clayton Act § 4 as similar to "that employed traditionally by courts at common law with respect to the matter of 'proximate cause.'" 457 U.S. at 477. It expressed the current basis by noting that the "potency of the [treble damages] remedy implies the need for some care in its application." *Id.* The *McCready* Court found antitrust injury only because the

plaintiff's injury, which was directly caused by the defendants' conspiracy, was "inextricably intertwined" with the very injury to competition that made the conspiracy unlawful. 457 U.S. at 484 & n.21.

The Court in *Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 519, 531-32, 533 & n.28, 535-36 (1983), even more clearly stated the common-law origins of the various limitations on antitrust recovery: "Congress simply assumed that antitrust damages litigation would be subject to constraints comparable to well-accepted common-law rules applied in comparable litigation." 459 U.S. at 533. Specifically, the Court described the antitrust-injury limitation as requiring a decision whether the plaintiff was "part of the class the Sherman Act was designed to protect" and stated that this decision required analysis of the plaintiff's claimed injury "to determine whether it is of the type that the antitrust statute was intended to forestall." 459 U.S. at 540.[9] The Court found that the *Brunswick* test was not satisfied in the *Associated General Contractors* case, even though the plaintiff had alleged a group boycott, *per se* illegal under Sherman Act § 1 (459 U.S. at 528), which was intended to, and assumedly did, injure the plaintiff. 459 U.S. at 540.

The Court addressed antitrust injury most recently in *Cargill*. The Court there reaffirmed that a plaintiff always

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[9] The Court also explained that the result in *McCready* turned on the fact that the plaintiff's injury was "'inextricably intertwined'" with the injury that reflected the anticompetitive effect that made defendants' conduct unlawful. 459 U.S. at 538 & n.39 (*quoting McCready*, 457 U.S. at 484).

must show antitrust injury as a first step in establishing standing: Antitrust injury "is necessary, but not always sufficient, to establish standing under § 4. . . ." 479 U.S. at 110 n.5. It also extended the antitrust-injury requirement to actions for injunctions under section 16. 479 U.S. at 113. The *Cargill* Court further reaffirmed as the test of antitrust injury that the plaintiff's claimed loss must be "'of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.'" *Id.* (*quoting Brunswick*, 429 U.S. at 489). Because the *Cargill* plaintiff claimed injury from increased price competition, the Court was able to dispose of the claim once it determined that the challenged prices were not predatory. 479 U.S. at 119.

B. The Ninth Circuit Relies Upon Two Incorrect Presumptions Rather Than Upon The Antitrust-Injury Analysis Announced In This Court's Opinions

The Ninth Circuit opinion substitutes its own erroneous presumptions for both elements of the antitrust-injury analysis required by this Court. Instead of examining the loss claimed by the particular plaintiff before the court, the Ninth Circuit presumes that antitrust injury can be assumed where the defendant's violation causing plaintiff's injury is *per se* illegal. And, instead of examining the precise anticompetitive effects that make the type of price fixing challenged here unlawful, the Ninth Circuit presumes that all types of price fixing are the same for antitrust-injury analysis. As demonstrated below, neither of these presumptions squares with the historical and policy underpinnings of the antitrust-injury requirement reviewed above.

1. The Ninth Circuit incorrectly presumes that *per se* illegality converts all causally related loss into antitrust injury

The Ninth Circuit opinion accepts uncritically the proposition that the *per se* illegality of vertical maximum price fixing automatically makes USA's claimed financial losses from "ARCO's illegal price-fixing . . . the type of injury that the antitrust rules were meant to prevent." 859 F.2d at 696. Thus, that statement follows several references to the *per se* illegality of the alleged "illegal price-fixing." For example, the opinion states only a few sentences earlier that "[t]he Supreme Court has clearly stated – and restated – that maximum resale price maintenance, as a form of price fixing, is *per se* illegal, and that rule binds us until the Court or Congress clearly states otherwise." *Id*. The Ninth Circuit's statement that it is bound by this Court's opinions on *per se* illegality confirms its belief that those decisions on substantive illegality control the antitrust-injury issue presented here.

The Ninth Circuit thereby confuses two analytically distinct antitrust principles. Their distinctness arises at a root level from the different statutes on which each is based: Antitrust injury is based on Clayton Act § 4 and *per se* illegality on Sherman Act § 1. Furthermore, each serves totally distinct purposes: The antitrust-injury requirement prevents recoveries in private actions that are at best fortuitous in light of antitrust policy and may even be anticompetitive. The *per se* rule obviates proving in both government and private actions that conduct is anticompetitively unreasonable, and therefore in violation of Sherman Act § 1, where such unreasonableness

can be categorically presumed. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 n.16 (1977) ("*Sylvania*").

The different origins and purposes of these two concepts cause each to depend upon totally different circumstances. *Per se* illegality depends upon effects in the market as a whole:

> "*Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct. But whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same – whether or not the challenged restraint enhances competition."

NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85, 103-04 (1984); *see National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978) ("In either [*per se* or rule of reason cases], the purpose of the analysis is to form a judgment about the competitive significance of the restraint"); *Sylvania*, 433 U.S. at 49-50. Those violations proved by a *per se* presumption and those proved by a rule of reason determination both turn on a finding, be it explicit or implicit, that the anticompetitive market effects outweigh any procompetitive market effects of defendant's conduct. Conduct that is *per se* illegal, like conduct that is illegal under the rule of reason, can have effects that are of no concern to the antitrust laws (in the sense that they do not reflect the reasons why the conduct is unlawful) and can even have procompetitive effects. *Sylvania*, 433 U.S. at 50 n.16.

Antitrust injury, on the other hand, depends upon the effects of the challenged conduct on the plaintiff and not

on any other market participant. *See* pp. 12-17 above. A person who suffers loss as a result of either a neutral or a procompetitive effect of a *per se* violation does not suffer antitrust injury. Accordingly, even where a *per se* violation is assumed, the antitrust-injury inquiry asks whether the relationship between the reasons for the illegality and the plaintiff's loss is of the type that will permit an antitrust recovery. Antitrust injury exists only where the plaintiff's injury reflects the reason for imposing *per se* illegality.

This conclusion is implicit in the Court's decision that the plaintiff did not satisfy the antitrust-injury test in *Associated General Contractors*, because the conspiracy assumed there was *per se* illegal. *See* 459 U.S. at 528. Several panels of the Seventh Circuit have reached this conclusion more explicitly.[10] *Indiana Grocery*, 864 F.2d at 1419; *Local Beauty Supply, Inc. v. Lamaur, Inc.*, 787 F.2d 1197 (7th Cir. 1986); *Jack Walters*, 737 F.2d at 709. *Indiana Grocery* explicitly rejected the argument, which was accepted by the Ninth Circuit panel in this case, that *per se* illegality under the Sherman Act (coupled with causal injury) establishes antitrust injury under section 4 of the Clayton Act:

> "[T]he mere presence of a substantive Sherman Act section 1 violation – again, *per se* or not – does not by itself bestow on any plaintiff a private right of action for damages . . . . While sections 1 and 2 of the Sherman Act focus on competitive conditions in the market as a whole, section 4 of the Clayton Act focuses on the *type* of injury claimed by a *particular* plaintiff and demands that it be 'antitrust injury.'"

864 F.2d at 1419 (citation omitted).

[10] In addition to the Ninth Circuit, only the Fourth Circuit has confused "antitrust injury" with *per se* illegality. *Lee-Moore Oil Co. v. Union Oil Co.*, 599 F.2d 1299, 1303 (4th Cir. 1979) ("[T]he rationale of *Brunswick* . . . may not be as readily applicable in cases which . . . charge *per se* violations of the Sherman Act").

2. The Ninth Circuit fails to account for the diverse effects on competition of different types of price fixing

The antitrust-injury analysis also requires an examination of the anticompetitive effects that make the challenged conduct unlawful. Even though USA's claimed losses resulted from *vertical maximum price fixing*, the Ninth Circuit opinion states that:

> "the proper question is not what type of injuries a rule against maximum resale price maintenance was meant to prevent, but what kind of injuries rules against price fixing were meant to prevent."

859 F.2d at 694. The Ninth Circuit purports to justify this proposition with the assertion that "[t]he Supreme Court has not discussed maximum resale price maintenance as a separate type of antitrust violation, but only as one form of price fixing." 859 F.2d at 693-94.

The assertion and its purported justification misstate this Court's antitrust-injury and price-fixing opinions. The antitrust-injury opinions require that the focus be on the specific anticompetitive effects that result in substantive illegality and not on any broad categorization into which the conduct at issue may fit. *Cf. Sylvania*, 433 U.S. at 59 (antitrust illegality "must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing"). For example, both the *Brunswick* and *Cargill*

opinions discuss the precise anticompetitive effects that would make the mergers involved therein illegal, as they were assumed to be:

> "If the acquisitions here were unlawful, it is because they brought a 'deep pocket' parent into a market of 'pygmies.' Yet respondents' injury – the loss of income that would have accrued had the acquired centers gone bankrupt – bears no relationship to the size of either the acquiring company or its competitors."

Brunswick, 429 U.S. at 487; *see Cargill*, 479 U.S. at 114. They do not discuss the panoply of anticompetitive effects that can be produced by different types of illegal mergers.

A rifle-shot, rather than a shot-gun, focus is required, for conduct violates the antitrust laws not because it falls within a certain category but because it produces certain anticompetitive effects. As this Court recently stated in *Sharp:*

> "The term 'restraint of trade' in the [Sherman Act], like the term at common law, refers not to a particular list of agreements, but to a particular economic consequence. . . ."

108 S. Ct. at 1523.

This principle applies to all restraints, including price fixing, as the Court has made clear in many opinions discussing the different types of price fixing. All restraints can be categorized by the relationship between the parties to the agreement:

> "Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints."

Sharp, 108 S. Ct. at 1522-23. Price fixing can be further categorized as either maximum price fixing, which sets ceilings above which prices cannot rise, and minimum price fixing, which sets uniform prices or floors below which prices cannot fall. *See Albrecht v. Herald Co.*, 390 U.S. 145, 156 (1968) ("*Albrecht*") (Harlan, J., dissenting).

The Court repeatedly has recognized the significant economic differences between horizontal and vertical restraints and between maximum and minimum price fixing. Most recently, it stated that:

> "This notion of equivalence between the scope of horizontal per se illegality and that of vertical per se illegality was explicitly rejected in *GTE Sylvania* . . . ."

Sharp, 108 S. Ct. at 1524. The *Sylvania* opinion heralded not only an appreciation of the need to distinguish vertical from horizontal restraints but of the related need to distinguish restraints on intrabrand competition from restraints on interbrand competition. The Court in *Sylvania* announced that interbrand competition, which it defined as "the competition among the manufacturers of the same generic product," was the "primary concern of antitrust law." *Sylvania*, 433 U.S. at 52 n.19. It there implicitly recognized that intrabrand competition, "the competition between the distributors – wholesale or retail – of the product of a particular manufacturer," (*id.*) is of concern only to the extent that there is also a demonstrable adverse effect on interbrand competition. *Id.* Of most significance here, the Court noted that:

> "The market impact of vertical restrictions is complex because of their potential for a simultaneous

reduction of intrabrand competition and stimulation of interbrand competition."

479 U.S. at 51-52; *see 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 341-42 (1987) ("[A] vertical restraint imposed by a *single* manufacturer or wholesaler may stimulate interbrand competition even as it reduces intrabrand competition") (citation omitted); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 348 n.18 (1982) ("[H]orizontal restraints are generally less defensible than vertical restraints").

Admittedly, in so describing the differences between horizontal and vertical restraints, the Court has distinguished between vertical *price* and *non-price* restraints and has reaffirmed that vertical price restraints remain *per se* illegal. The distinctions, however, are not significant here. After *Sylvania*, the Court has distinguished between vertical price and non-price restraints only with respect to vertical *minimum* price fixing.[11] Vertical maximum price fixing has quite different economic effects. Indeed, the potential for stimulation of interbrand competition is the greatest when the vertical intrabrand

[11] Most recently, in *Sharp*, the Court distinguished vertical price from non-price restraints on the ground "that vertical price restraints reduce *inter*brand price competition because they 'facilitate cartelizing.' " 108 S. Ct. at 1520 (citation omitted). That obviously is a concern only where minimum price fixing is involved. *See* p. 25-26 n.12 below. The *Sharp* Court there referred back to footnote 18 of *Sylvania*, in which the Court limited its holding (although not its analysis) to non-price vertical restrictions. 433 U.S. at 51 n.18. That footnote similarly discussed effects presented only by minimum price fixing.

restraint directly *reduces* prices. Intrabrand price reductions will cause the sellers of competing brands either to reduce their prices or convince consumers of the superiority of their products at the non-reduced prices. This is the essence of competition.

Even while adhering to the *per se* illegality of maximum price fixing, the Court has recognized that it presents different economic issues. In *Albrecht*, 390 U.S. at 152, the majority opinion stated: "Maximum and minimum price fixing may have different consequences in many situations." The Court adhered to the rule making maximum vertical price fixing *per se* illegal, citing economic consequences different than those involved in minimum price fixing. *See* pp. 31-32 below. Justice Harlan, dissenting, stated the economic truth that maximum and minimum price fixing are not "economically equivalent." 390 U.S. at 156. Justice Harlan noted that the effects of minimum price fixing were "higher prices, less efficient use of resources, and an easier life for the resellers," which were the same anticompetitive effects presented by a horizontal price-fixing conspiracy of the dealers. 390 U.S. at 157. Accordingly, minimum price fixing "lessens horizontal interbrand competition" and "act[s] to the direct detriment of the public interest as viewed in the Sherman Act." *Id.* On the other hand, the price ceilings imposed by vertical maximum price fixing "do not lessen horizontal competition" but instead "drive prices toward the level that would be set by intense competition." 390 U.S. at 159.[12] In short, vertical maximum price fixing can

[12] Vertical maximum price fixing may be distinguished from vertical minimum price fixing, because only the latter can

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have the direct procompetitive effect of "prevent[ing] retailers or wholesalers from reaping monopoly or supercompetitive profits." *Id.*

This brief review amply refutes the Ninth Circuit's assertion that the Court's opinions have not separately discussed either the reason why vertical maximum price fixing is condemned or the economic effects resulting therefrom. More importantly, as discussed below, when the focus is placed specifically on vertical maximum price fixing, it is clear that USA's claimed losses as a competitor do not satisfy any of the *Brunswick* formulations for ascertaining antitrust injury.

C. The Correct Analysis Shows That USA's Injury As A Competitor Does Not Reflect The Anticompetitive Effects That Make Vertical Maximum Price Fixing Unlawful

The *Brunswick* opinion sets forth several slightly different articulations of the gist of antitrust injury. The first

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have a proscribed horizontal effect. Vertical minimum price fixing is likely to result from dealer pressure on the manufacturer, because price floors are in the interest of the dealers, not of the manufacturer (which should want the lowest feasible prices to maximize its sales volumes). *See* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, II*, 75 Yale L.J. 373, 403-07 & n.68 (1966). Price ceilings, however, are in the manufacturer's, not the dealers', interest and therefore are likely to be imposed unilaterally by the manufacturer. As a result, vertical maximum price fixing closely resembles the single manufacturer vertical restraints described in *Sylvania* and *324 Liquor*. *See* Easterbrook, *Maximum Price Fixing*, 48 U. Chi. L. Rev. 886, 890 n.20 (1981) ("Maximum resale price fixing has none of the potential anticompetitive consequences of horizontal maximum price fixing . . . ").

requires that the plaintiff's loss be linked to the reasons why the conduct is illegal – the loss must be the type that "the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick*, 429 U.S. at 489. The second requires that the plaintiff's loss be linked to the economic rationale for illegality – the loss must reflect the "anticompetitive effect . . . of the violation." *Id.* The third acts as a check on the first two by asking if the plaintiff "would have suffered the identical 'loss' – but no compensable injury" in the absence of that which makes the acts unlawful. 429 U.S. at 487. As demonstrated below, USA's loss from the competition of ARCO prices assumedly lowered by unlawful vertical maximum price fixing fails to satisfy any of these articulations.

1. USA's injury is not the type that the rule against vertical maximum price fixing was intended to prevent

The Court first identified the reason why vertical maximum price fixing is *per se* illegal in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951). *Kiefer-Stewart* involved a horizontal agreement among liquor companies to impose maximum resale prices on their dealers. 340 U.S. at 213. The Court identified the following single reason for holding such an agreement *per se* illegal:

> "[S]uch agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment."

Id. The Court in *Albrecht*, 390 U.S. at 152, cited this

language as the reason to "adhere" to the rule of *Kiefer-Stewart*.[13]

Accordingly, both *Kiefer-Stewart* and *Albrecht* identify the defendants' coerced dealers as the class intended to be protected by the proscription against vertical maximum price fixing. It is the coerced dealers (referred to as "traders") whose freedom is crippled and whose ability to price in accordance with their own judgment is restrained. This conclusion does not follow simply from the above-quoted language. The conclusion also follows ineluctably from the fact that successful coercion of the dealer is the essence of vertical maximum price fixing. Without such coercion there simply is no illegality. Or, to put it in *Brunswick* terms, coercion is "that which makes defendants' acts unlawful." 429 U.S. at 489.

The *Albrecht* opinion clearly held that successful supplier coercion was required for vertical maximum price fixing. It stated that the plaintiff newspaper courier "could have claimed a combination between [the newspaper] and himself, *at least as of the day he unwillingly complied with [the newspaper's] advertised price.*" 390 U.S. at 150 n.6 (emphasis added).[14] And, the Court described the unlawful combination as one "to *force* [plaintiff] to conform to the advertised retail price." 390 U.S. at 149

[13] The *Albrecht* Court also identified several anticompetitive effects that might result from the dealers' loss of pricing freedom, as discussed at pp. 31-32 below.

[14] The unlawful combination actually found in *Albrecht* was between the newspaper, an agency hired to solicit plaintiff's customers and other carriers. 390 U.S. at 149.

(emphasis added).[15] The Circuit Courts consistently have followed this holding by ruling that it is the dealer's loss of pricing discretion (when he succumbs to his supplier's price coercion) that separates lawful price suggestion from unlawful vertical price fixing.[16]

[15] The Court there also stated that in *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960), "[t]he combination with retailers arose because their acquiescence in the suggested prices was secured by threats of termination. . . ." 390 U.S. at 149.

[16] *See, e.g., Belfiore v. New York Times Co.*, 826 F.2d 177, 181 (2d Cir. 1987) (no vertical maximum price fixing because "no coerced pricing occurred"; competition that pressures a firm to lower its prices is "precisely the conduct the antitrust laws were designed to foster, not suppress"), *cert. denied*, ___ U.S. ___, 108 S. Ct. 1030 (1988); *Bender v. Southland Corp.*, 749 F.2d 1205, 1212 & n.4 (6th Cir. 1984) ("Establishing a *per se* violation of the Sherman Act in a private action brought under a vertical price fixing theory requires proof . . . [that] the defendant . . . coerced the plaintiff into charging higher or lower prices"; *Albrecht* "supports the notion that coercion must be demonstrated in a private action brought under a vertical price fixing theory"); *Arnott v. American Oil Co.*, 609 F.2d 873, 885 (8th Cir. 1979) (vertical maximum price fixing found through evidence that "dealers were forced by means of threats and other coercive tactics to set gasoline retail prices at prices fixed by" the supplier), *cert. denied*, 446 U.S. 918 (1980); *Santa Clara Valley Distrib. Co. v. Pabst Brewing Co.*, 556 F.2d 942, 945 & n.3 (9th Cir. 1977) (vertical price fixing "theory required that plaintiffs show the requisite degree of enforcement coercion by Pabst"); *Chisolm Bros. Farm Equipment Co. v. Int'l Harvester Co.*, 498 F.2d 1137, 1142 (9th Cir.) ("The crux of any price fixing agreement is the relinquishment by the trader . . . of the freedom to set prices in accordance with his own judgment"), *cert. denied*, 419 U.S. 1023 (1974).

This principle is significant to the District Court's antitrust-injury decision here. A gasoline supplier can be found to have engaged in vertical price fixing only where the "dealers succumbed to" its price coercion. *In re Coordinated Pretrial Proceedings In Petroleum Products Antitrust Litigation*, 691 F.2d 1335, 1343 (9th Cir. 1982), *cert. denied*, 464 U.S. 1068 (1984), *citing Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1355-57 & n.3 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977); *see also Gray v. Shell Oil Co.*, 469 F.2d 742, 747-48 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973). Those opinions establish that a gasoline supplier may seek lower dealer prices through " 'exposition, persuasion and argument' " (*Gray*, 469 F.2d at 748 (citation omitted)) and discounts or subsidies to the dealers. *Petroleum Products*, 691 F.2d at 1343; *Hanson*, 541 F.2d at 1357. The supplier, however, cannot cross the line by coercing dealer compliance with its price suggestions.

USA's complaint alleges that ARCO engaged in various kinds of conduct to lower the retail prices at ARCO stations. (*See* JA 17-20.) Only coercive conduct that succeeded in depriving the dealers of pricing discretion will support a claim of vertical maximum price fixing. Accordingly, the District Court's assumption that ARCO engaged in unlawful vertical price fixing (Pet. App. B, ¶ 5) simply accepted for purposes of the motion that USA could prove that an ARCO dealer (or dealers) competing with USA succumbed to ARCO's price coercion. That might be sufficient under existing law to establish illegality, but it is not sufficient to establish antitrust injury, because USA's loss is not the reason for the assumed illegality.

2. USA's injury does not reflect the anticompetitive effects that make vertical maximum price fixing unlawful

The Court in *Albrecht* did not simply rest its decision on the dealer's loss of pricing freedom. It also identified several adverse economic effects that it believed could result from the dealer's loss of the ability to charge higher prices:

> "[S]chemes to fix maximum prices, by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, may severely intrude upon the ability of *buyers* to compete and survive in that market. . . . Maximum prices may be fixed too low for the *dealer* to furnish services essential to the value which goods have for the consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay. Maximum price-fixing may channel distribution through a few large or specifically advantaged *dealers* who otherwise would be subject to significant non-price competition."

390 U.S. at 152-53 (emphasis added).

Each of these anticompetitive effects refers to injuries suffered by the coerced dealers or by their customers. The intrusion on the "ability of *buyers* to compete and survive" refers to the coerced dealers' lost revenue as a result of not being able to price above the ceiling, as the Court makes clear by the language that follows: The maximum prices may be "too low for the *dealer*" to furnish all of the services that he and his customers may desire. Similarly, the possibility that price ceilings may channel distribution through a few large or specifically advantaged dealers refers to indirect effects on the coerced dealers as a result of having lost this revenue.

Such dealers may not be able to offer services and other types of non-price competition that they could have offered if they could have charged higher prices.

The *Albrecht* opinion refers to only one other possible anticompetitive effect justifying the *per se* rule against vertical maximum price fixing: where the actual price is almost always the maximum price "the scheme tends to acquire all the attributes of an arrangement fixing minimum prices." 390 U.S. at 153. This effect refers to the possibility that the price fixing might result in prices higher than otherwise would have prevailed. Competitors are not the intended beneficiaries to the extent that the rule is premised on this effect. Indeed, competitors are benefitted, not hurt, when the dealers with which they compete are compelled to charge higher prices or offer fewer services. *Cf. Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 596 n.20 ("*Matsushita*"). The consumers, who pay the higher prices, are the intended beneficiaries of the rule against minimum price fixing.

As the above discussion demonstrates, neither *Kiefer-Stewart* nor *Albrecht* identifies competitors of the coerced dealers as a protected class. Nor does either opinion identify any injuries to such competitors as a reason for imposing *per se* illegality.

3. USA would have suffered the identical loss – but not compensable injury – from lower ARCO prices set by conduct not amounting to price fixing

The Court in *Brunswick* illustrated the correctness of its antitrust injury decision by noting that the plaintiffs'

injury bore no relationship to the reasons for the assumed illegality. The mergers were assumed to be unlawful because they "brought a 'deep pocket' parent into a market of 'pygmies.'" However, as the Court noted, the plaintiffs' injury was unrelated to the size either of the defendant (*i.e.*, that it had a deep pocket) or of its competitors (that they were "pygmies"). The plaintiffs

> "would have suffered the identical 'loss' – but no compensable injury – had the acquired centers instead obtained refinancing or been purchased by 'shallow pocket' parents. . . ."

429 U.S. at 487.

An analogous illustration confirms that USA's claimed losses here are not antitrust injury. USA's claimed lost profits and sales resulted from the lower prices at competing ARCO stations. The lower prices at ARCO stations, in turn, resulted from price allowances granted by ARCO allegedly to "facilitate[] control by ARCO of the resale prices charged by its branded distributors and dealers." (JA 18.) USA stated the proposition more bluntly in its Reply Brief in the Ninth Circuit, which describes the gravamen of ARCO's conduct injuring USA as "fix[ing] prices that ARCO dealers could not charge absent ARCO's subsidy . . . ." (USA Reply Brief, at 1.) USA thus claims that it lost profits and sales as a result of the dealer's pass-through of the "subsidy" granted it by ARCO. But, USA would have suffered the same losses whether that pass-through resulted from ARCO's lawful "exposition, persuasion and argument" or unlawful coercion. USA's losses, in sum, resulted from the lower prices and not from the dealers' assumed loss of their pricing

independence.[17] Therefore, just as in *Brunswick*, USA's claimed losses bear no relationship to the reasons for the assumed illegality.

D. The Ninth Circuit Rule Perverts The Antitrust-Injury Requirement By Permitting A Competitor Lawsuit That Is Inimical To The Purposes Of The Antitrust Laws

The Ninth Circuit rule does not merely permit an antitrust claim that is of no concern to the applicable antitrust policy. In permitting a competitor to recover for losses resulting from increased nonpredatory competition, the rule sanctions claims that are contrary to the fundamental purposes of the antitrust laws. Such a result directly conflicts with this Court's opinions in *Brunswick* and *Cargill* and is fundamentally inconsistent with the non-antitrust-injury opinions in *Sharp* and *Matsushita*.

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[17] Indeed, USA claimed identical losses from the low ARCO prices at stations owned by ARCO. Nine of the 102 ARCO stations that USA claimed caused its injury are ARCO-owned. *See* p. 4 n.2 above. Certainly, the dismissal of USA's Sherman Act § 2 claim rendered those losses not compensable injury, because intra-ARCO conduct cannot violate Sherman Act § 1. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). But, USA claimed the exact same injury from these prices as it continues to claim from the assumed price fixing at the other stations, thus demonstrating that USA's losses resulted from the lower prices and not the unlawful conspiracy. Similarly, USA will not have suffered compensable injury at any of the remaining 93 stations where it cannot establish both ARCO coercion and the dealer's succumbing because it will have failed to establish an antitrust violation. Nonetheless, it will have suffered the same losses from low prices at those stations.

1. Consumer welfare is the primary concern of the antitrust laws and the touchstone of antitrust injury

The Court in *Brunswick* established the consumer interest in competition as the touchstone of antitrust injury. Thus, the Court stated that it would be "inimical to the purposes of" the antitrust laws to award damages for losses from increased competition, because "[t]he antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*.' " *Brunswick*, 429 U.S. at 488 (*quoting Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). The Court in *Cargill* reaffirmed that lost profits resulting from increased competition cannot be antitrust injury. 479 U.S. at 117.

These antitrust-injury opinions accord with the Court's other pronouncements concerning the purposes for which the Sherman Act was enacted and the class of persons it was intended to protect. "Congress designed the Sherman Act as a 'consumer welfare prescription.' " *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (*quoting* R. Bork, *The Antitrust Paradox* 66 (1978)).[18] Interbrand competition leads to lower prices to consumers and for that reason is " 'the primary concern of antitrust law.' " *Sharp*, 108 S. Ct. at 1519 (*quoting Sylvania*, 433 U.S. at 52 n.19).[19]

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[18] *See also* Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. L. & Econ. 7, 10 (1966).

[19] The Circuit Courts have followed this Court's lead. *See, e.g., Monahan's Marine, Inc. v. Boston Whaler, Inc.*, 866 F.2d 525, 527 (1st Cir. 1989) ("The Sherman Act's very purpose is to help consumers, in part by bringing about low, nonpredatory

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A rule disallowing antitrust claims for losses resulting from price cutting or other forms of increased competition also accords with the Court's admonition in *Matsushita*, 475 U.S. at 594, not to permit use of the antitrust laws to stifle competition. After noting that "cutting prices in order to increase business often is the very essence of competition," the Court warned against creating rules that could discourage price cutting and thereby "chill the very conduct the antitrust laws are designed to protect." *Id.; see Cargill*, 479 U.S. at 121 n.17. The Seventh Circuit applied this policy in the antitrust-injury context:

> "Whenever the plaintiff and consumers have divergent rather than congruent interests, there is a potential problem in finding 'antitrust injury.' . . . When the plaintiff is a poor champion of consumers, a court must be especially careful not to grant relief that may undercut the proper functions of antitrust."

Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance,

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prices"); *Alberta Gas Chemicals, Ltd. v. E.I. Du Pont de Nemours and Co.*, 826 F.2d 1235, 1239 (3d Cir. 1987) ("Conduct that harms competitors may benefit consumers – a result the antitrust laws were not intended to penalize"), *cert. denied*, ___ U.S. ___, 108 S. Ct. 2830 (1988); *Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261, 266 (7th Cir. 1984) ("The purpose of the antitrust laws as it is understood in the modern cases is to preserve the health of the competitive process – which means . . . to discourage practices that make it hard for consumers to buy at competitive prices – rather than to promote the welfare of particular competitors"), *cert. denied*, 477 U.S. 1018 (1985); *Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256, 1259 (9th Cir. 1981) (the antitrust laws "do not prohibit non-predatory conduct that results in a lower price to the consumer. The antitrust laws do not require the erection of a price umbrella for the benefit of inefficient competitors"), *cert. denied*, 455 U.S. 1018 (1982).

Inc., 784 F.2d 1325, 1334 (7th Cir. 1986); *see Alberta Gas Chemicals, Ltd. v. E.I. Du Pont de Nemours and Co.*, 826 F.2d 1235, 1241 (3d Cir. 1987) ("Mindful that antitrust law aims to protect competition, not competitors, we must analyze the antitrust injury question from the viewpoint of the consumer"), *cert. denied*, ___ U.S. ___, 108 S. Ct. 2830 (1988); Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 34-36 (1984).

The Ninth Circuit opinion violates these principles by completely ignoring the direct benefit to consumer welfare from the lower ARCO prices challenged here.[20] Moreover, it in fact rejects the *Brown Shoe* "aphorism" (859 F.2d at 695) by holding that the "antitrust laws were . . . intended to give entrepreneurs . . . an 'even playing field.' " 859 F.2d at 697. The Ninth Circuit thereby treats as equivalents injury to a competitor and injury to the competitive process. But, these two most definitely are not equal in the eyes of antitrust. The Ninth Circuit's contrary conclusion is not only conceptually incorrect, but, as demonstrated at pp. 43-44 below, on the facts of this case actually threatens consumer welfare.

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[20] The Ninth Circuit does state that "the long-term consequences [of maximum price fixing] may be higher prices and reduced services to consumers." 859 F.2d at 696. To support that proposition, it cites *Albrecht* and *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940). The *Albrecht* opinion contains no such statement and *Socony-Vacuum* involved horizontal minimum price fixing. More importantly, as discussed at pp. 43-44 below, the District Court's unchallenged findings in this case specifically refute that generalized conclusion.

2. Vertical maximum price fixing can injure consumer welfare and inflict antitrust injury only where the resulting price ceilings pose a dangerous probability of monopoly

This Court's recent opinions in *Cargill* and *Matsushita* confirm that artificially low prices threaten consumer welfare only where they create a dangerous probability of future supracompetitive pricing. Only prices that so threaten consumer welfare are predatory and, as the Court in *Cargill* held, "capable of inflicting antitrust injury." 479 U.S. at 118.

In *Cargill*, the Court rejected the claim that the illegal merger could inflict antitrust injury through "sustained predatory pricing" aimed at plaintiff. 479 U.S. at 117. The Court concluded that the plaintiff had neither raised nor proved a claim of predatory pricing in the district court.[21] 479 U.S. at 119. The Court also suggested that the district court's findings on market share and barriers to entry would have precluded a claim of predatory pricing necessary for antitrust injury, even if one had been made. 479 U.S. at 119 n.15.

The Court defined predatory pricing as

> "pricing below an appropriate measure of cost for the purpose of eliminating competition in the short run *and reducing competition in the long run*. It is a practice that harms both competitors *and competition*. In contrast to price cutting aimed simply at increasing market share, predatory pricing has as its aim *the elimination of competition*."

[21] Similarly, USA neither raised the issue whether, nor proffered any evidence that, the challenged ARCO prices were predatory. *See* p. 43-44 n. 27 below.

479 U.S. at 117-18 (emphasis added). The Court further described "the elimination of competition," as it used the phrase in this definition, as the creation of monopoly power required for supracompetitive pricing. This is explicit in the Court's statement that the long-run gain from predatory pricing

> " 'depends on successfully neutralizing the competition . . . [and] on maintaining monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain.' "

479 U.S. at 121 n.17 (*quoting Matsushita*, 475 U.S. at 589). And, it is implicit in the Court's statement that defendant's "21% market share after the merger suggests it would lack sufficient market power to engage in predatory pricing." 479 U.S. at 119 n.15.

In *Matsushita*, the Court similarly defined predatory pricing. Part IV.A of that Opinion, citing articles by Professors Bork, McGee and Easterbrook, repeatedly defined predatory pricing in terms of future monopoly power. *See* 475 U.S. at 588-93. The Court there stated:

> "[T]he conspirators must have a reasonable expectation of recovering, *in the form of later monopoly profits*, more than the losses suffered. . . . Moreover, it is not enough simply to achieve *monopoly power*, as monopoly pricing may breed quick entry by new competitors eager to share in the excess profits. The success of any predatory scheme depends on *maintaining monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain*."

475 U.S. at 589 (emphasis (except for the Court's emphasis on "maintaining") added).

Matsushita reinstated the district court's summary judgment, which had been based on the plaintiffs' failure to establish "a genuine issue of material fact as to whether [defendants] entered into an illegal conspiracy that caused [plaintiffs] to suffer a cognizable injury." 475 U.S. at 585-86. In order to determine if plaintiffs had raised such an issue, the Court had to identify the type of conspiracy that could cause plaintiffs a "cognizable injury." *Id.* The Court did not find, and the plaintiffs (unlike USA in this case) did not even contend, that a conspiracy merely to set lower prices could inflict antitrust injury on the plaintiffs, who were competitors of the defendants.[22] Rather, the only conspiracy that could "have caused [plaintiffs] to suffer an 'antitrust injury' " was a "conspiracy to monopolize the American market through predatory pricing. . . ." 475 U.S. at 586. The Court

[22] The Court, however, did find that a conspiracy not involving "(i) pricing below the level necessary to sell their products, or (ii) pricing below some appropriate measure of cost" could *not* cause plaintiff's antitrust injury. 475 U.S. at 584-85 n.8. The Court made clear in three respects that footnote 8 stated only that below-market or below-cost pricing is *necessary*, but not that it is *sufficient*, for antitrust injury. First, the relevant sentence begins with the qualification: "For purposes of this case, it is *enough to note*." (Emphasis added.) Second, the concluding sentences of the footnote confirm that it deals only with the threshold, cause-in-fact aspect of antitrust injury, and not with the *Brunswick* requirement. Third, as demonstrated above, the Court described the only conspiracy that could inflict injury cognizable under *Brunswick* as one "to monopolize the American market through predatory pricing." 475 U.S. at 586.

therefore held that only "a genuine issue concerning the existence of a predatory pricing conspiracy" (not merely a price fixing conspiracy) could defeat defendants' summary judgment motion. *Id.*

The Court's focus in *Matsushita* and *Cargill* on the danger of creating a market structure that would permit future monopoly pricing as the standard for predatory pricing is fully supported by commentators,[23] antitrust enforcers[24]

[23] *See, e.g.*, Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 Yale L.J. 284, 292 (1977) (60 percent share necessary); Areeda & Turner, *Williamson on Predatory Pricing*, 87 Yale L.J. 1337, 1348 (1978) (60 percent figure too low), *both cited in Cargill*, 479 U.S. at 119-120 n.8.

[24] *See, e.g.*, May 15, 1989 letter from the Federal Trade Commission to the Texas State Senate, commenting on a proposed bill to outlaw certain forms of below cost pricing:

> "To screen out those cases in which predatory pricing is unlikely. . . . [The] initial inquiry focuses on whether a market is so structured and so protected by entry barriers that predation is a realistic possibility. The Commission has followed this approach in its own most recent predatory pricing cases. In dismissing the charges in these cases, the Commission found it unnecessary to reach a detailed examination of evidence relating to either intent or conduct. Rather, the Commission observed in each case that the market structure and the vigor of current competition precluded any dangerous probability that below cost pricing, if it had occurred, could have led to sustained monopoly power.
>
> "This phased approach permits careful evaluation of predatory pricing complaints, yet also reduces the

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and the Courts of Appeal.[25] Moreover, any other definition would impermissibly elevate the interests of competitors over the interests of consumers. The losses to competitors from low prices that cannot lead to successful predation represent gains to consumers that will never be offset by future supracompetitive prices.

3. The Ninth Circuit rule, not the low ARCO prices challenged here, poses a threat to consumer welfare

The Ninth Circuit nonetheless would permit a competitor to recover its losses from *nonpredatory* prices restrained by vertical maximum price fixing. This rule would compensate competitors for profits lost as the result of low prices that both benefitted consumers in the short run and did not pose any threat to consumer

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resources necessary to assess them, because market structure and entry barrier information typically is more available and less ambiguous than evidence regarding an individual firm's cost levels or intent to monopolize. In addition, reliance on market evidence limits the risk that a law enforcement investigation might chill legitimate price competition."

FTC Letter, at 6-7.

[25] *See, e.g., Transamerica Computer Co. v. IBM Corp.*, 698 F. 2d 1377, 1384 (9th Cir.) ("Predatory pricing occurs when a company that controls a substantial market share lowers its prices to drive out competition so that it can charge monopoly prices, and reap monopoly profits, at a later time"), *cert. denied*, 464 U.S. 955 (1983).

welfare in the long run. By definition, that is inimical to consumer welfare.

The Ninth Circuit seeks to justify its rule by citing possible long-term adverse effects on consumers.[26] However, the unsupported assertion that such effects could result is inconsistent both with the definition of nonpredatory prices (*see* pp. 38-42 above) and with the unchallenged findings of the District Court that the ARCO prices are not predatory.

The District Court explicitly found that the challenged prices are not predatory. First, the District Court established pursuant to Fed. R. Civ. Proc. 56(d) undisputed facts showing the absence of threatened monopolization. (Pet. App. B, ¶¶ 1-4.) These findings were based upon a substantial and undisputed factual record showing the absence of any conceivable danger that ARCO-brand sellers could obtain monopoly power in the gasoline market that might enable them later to raise prices to supracompetitive levels and thereby to recoup their losses during the period of alleged predation. (*See* Dckt. NR 80.)[27] Then, ruling that USA could not establish anti-

[26] *See* 859 F.2d at 694 ("Even if we were to analyze the question at the more specific level of maximum resale price fixing, given the long-term consequences of that practice we would reach the same result for similar reasons"), 696 ("[W]hen firms conspire to fix low prices in order to drive out competition, the long-term consequences may be higher prices and reduced services to consumers").

[27] ARCO moved for summary judgment on the ground that USA's injury from the prices at ARCO service stations

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trust injury "without showing such [vertically-imposed maximum] prices to be predatory," the District Court further found: "[u]nder the circumstances here concerned . . . no such showing can be made." (Pet. App. B, ¶ 5.)[28]

The District Court's findings establish that the low ARCO prices challenged by USA can only benefit consumers. In these circumstances, the allowance of USA's antitrust action challenging those prices injures consumers. Moreover, the allowance of such actions gener-

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could "constitute[] 'antitrust injury' for Clayton Act purposes only if those prices are 'predatory' " in that they "create[] the dangerous probability that the defendant(s) may achieve a monopoly with the concomitant ability to raise prices in the future." Memorandum In Support Of Motion For A Pretrial Order, etc., at 10, 16-18. (Dckt. NR 83.) ARCO's motion placed the burden on USA of proffering evidence that the ARCO prices were predatory or an affidavit pursuant to Fed. R. Civ. P. 56(f) explaining that it needed additional discovery to prove that the prices were predatory. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). USA elected not to challenge that showing, but to contend only that the issue whether the prices were predatory was irrelevant, because vertical maximum price fixing is *per se* illegal. *See, e.g.*, Plaintiff's Statement of Genuine Issues, etc., ¶¶ 1-3 (JA 86-87). USA sought additional discovery to prove conspiracy, not predatory pricing. *See* 10/14/86 Transcript of Hearing on ARCO's Summary Judgment Motion, at p. 10, lines 22-24 (When asked by the District Court "what are you going to find . . . through this discovery," USA's counsel responded "[a] conspiracy . . . ").

[28] USA did not challenge on appeal this finding or the undisputed facts on which it was based. Accordingly, the issue of whether the challenged prices were predatory is not before this Court. *See, e.g., Solorio v. United States*, 483 U.S. 435, 451 n.18 (1987); *Lawn v. United States*, 355 U.S. 339, 362 n.16 (1958).

ally will discourage manufacturers whose products reach consumers through resellers from embarking on price cutting programs.[29] The Court therefore should announce an antitrust-injury rule precluding competitor actions challenging nonpredatory vertical maximum price fixing.

[29] The danger of such actions is compounded by the fact that a competitor could contend, as USA has done here (*see* Petition, at 26-27 n.9 (*quoting* Dckt. NR 84 (at pp. 47-48))), that it can use as evidence of maximum price fixing (i) the manufacturer's subsidization of its dealers' lower prices by granting discounts, (ii) the manufacturer's suggestion of lower prices to its dealers and (iii) decreases in the dealers' prices following decreases in the manufacturer's wholesale prices. The threat of a competitor lawsuit could cause a manufacturer "to forgo legitimate and competitively useful conduct rather than risk treble damages. . . ." *Sharp*, 108 S. Ct. at 1521; *see Cargill*, 479 U.S. at 121 n.17; *Matsushita*, 475 U.S. at 594-95; Baumol & Ordover, *Use of Antitrust to Subvert Competition*, 28 J. L. & Econ. 247, 254 (1985).

CONCLUSION

For the reasons stated above, the judgment of the Ninth Circuit should be reversed and the summary judgment of the District Court reinstated.

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Respectfully submitted,

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